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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

FRANK REYNOLDS,d/b/a Reynolds Fisheries,
PORT CLINTON FISH COMPANY,
JAMES MARICQUE
Petitioners

v.

FRANCES S. BUCHHOLZER,
Director of Ohio Department of Natural Resources;
RICHARD B. PIERCE,
Chief of the Ohio Division of Wildlife;
GEORGE V. VOINOVICH,
Governor of the State of Ohio
Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Jeffrey C. Zilba
ZILBA & DILABBIO
Three Canton Square
Toledo, Ohio 43624
(419) 255-1515
Counsel of Record

Joan C. Weiser
Ass't Ohio Attorney General
Ohio Dept. of Nat. Resources
Fountain Square, D-2
Columbus, Ohio 43224-1387
(614) 265-6870

47 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COMMERCE CLAUSE FORBIDS STATES TO PREFER COMPETING INTEREST GROUPS IN THE ALLOCATION OF ITS NATURAL RESOURCES SO AS TO BOLSTER LOCAL ECONOMICS TO THE DETRIMENT OF COMMERCIAL TRADE

II. WHETHER THE COMMERCE CLAUSE PROHIBITS A STATE FROM ALLOCATING A PLENTIFUL NATURAL RESOURCE UNDER THE GUISE OF CONSERVATION WHEN THE BURDEN ON INTERSTATE COMMERCE IS CLEARLY EXCESSIVE IN RELATION TO THE PUTATIVE LOCAL BENEFITS OCCASIONED BY THE STATE'S REGULATORY SCHEME AND WHEN LESSER BURDENSOME MEASURES ARE CLEARLY AVAILABLE

STATEMENT PURSUANT TO RULE 29.6

Petitioner Port Clinton Fish Company has no parent nor subsidiary company required to listed by this Court's Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. THE COMMERCE CLAUSE FORBIDS STATES TO PREFER COMPETING INTEREST GROUPS IN THE ALLOCATION OF ITS NATURAL RESOURCES SO AS TO BOLSTER LOCAL ECONOMICS TO THE DETRIMENT OF INTERSTATE COMMERCE 7

II. THE COMMERCE CLAUSE PROHIBITS A STATE FROM HOARDING A PLENTIFUL NATURAL RESOURCE UNDER THE GUISE OF CONSERVATION WHEN THE BURDEN ON INTERSTATE COMMERCE IS CLEARLY EXCESSIVE IN RELATION TO THE PUTATIVE LOCAL BENEFITS OCCASIONED BY THE STATE'S REGULATORY SCHEME 11

CONCLUSION 13

APPENDIX A A-1

TABLE OF AUTHORITIES

Cases

Conley v. Gibson, 355 U.S. 41 (1957) 4
Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) . . . 9
Geer v. Connecticut, 161 U.S. 519 (1896) 10
H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) 10
Hishon v. King & Spalding, 467 U.S. 69 (1984) 4, 11
Hughes v. Oklahoma, 441 U.S. 322 (1979) 8, 10, 11
Huron Cement Company v. Detroit, 362 U.S. 440 (1959). .12
LaCoste v. Louisiana Department of Conservation,
63 U.S. 545 (1924) 10
Manchester v. Massachusetts, 139 U.S. 240 (1891) 9
Minnesota v Clover Leaf Creamery , 449 U.S. 456
(1981) 8, 12
Missouri v. Holland, 252 U.S. 416 (1920) 9
Oregon Waste Sys., Inc. v. Department of Envtl. Quality
of State of Oregon, 114 F. Ct. 11345 (1994) 8
Philadelphia v. New Jersey, 437 U.S. 617 (1978) 8
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 8, 11, 12
Reynolds v. Buchholzer, No. 94-4294 (6th Cir. 1996) . . . 5, 6
Scheurer v. Rhodes, 416 U.S. 232 (1974) 5
Solis v, Miles , 524 F. Supp. 1069 (1981) 5, 6, 8
State v. Port Clinton Fish Co., 43 Ohio St. 3d 93, 538
N.E.2d 1055 (1989), cert. den.493 U.S. 892 (1989) . .3, 9
Toomer v. Witsell, 334 U.S. 385 (1948) 9

Constitutional Provisions, Statutes and Regulations

U.S. Const. art.1, § 8, cl. 3 . . . . . *passim*
Ohio R.C. §§ 1531, 1533 13
Ohio R.C. 1533.63 1
Ohio Admin. Code, Section 1501.31–3–01 -03 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this Petition has been recommended for full-text publication pursuant to Sixth Circuit Rule 24; its electronic citation is 1996 FED App. 0191P (6th Cir.)(file name: 96a0191p.06) and is reprinted in Appendix A hereto at page A-1.

The Memorandum Opinion of the United States District Court for the Northern District of Ohio, Western Division which preceded the opinion of the Sixth Circuit was entered by the Hon. David D. Dowd and file-stamped with the District Court on September 26, 1994. It is reprinted in Appendix A hereto at page A-8.

JURISDICTION

Petitioners filed their Complaint on September 16, 1993 requesting that the United States District Court for the Northern District of Ohio, Western Division, declare that Ohio Revised Code, Section 1533.63 and Ohio Admin. Code, Section 1501.31–3–01, 02 and 03, are unconstitutional as violative of the U.S. Constitution's Commerce Clause. On September 26, 1994, the trial court granted Respondent's Motion to Dismiss stating that as a matter of law the Ohio's statute and regulation do not discriminate in practical effect nor do they unreasonably burden commerce. Petitioners filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit and on July 1, 1996, the Court of Appeals affirmed the decision of the trial court. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the decision of the Sixth Circuit.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. Const. art.1, § 8, cl. 3 provides:

> The Congress shall have the power to [...] regulate Commerce with foreign Nations, and among the several States.

Ohio R.C. § 1533.63 is reprinted in Appendix A hereto at page A-15.

Ohio Admin. Code 1503:31–3–01 is reprinted in Appendix A hereto at page A-21.

STATEMENT OF THE CASE

Ohio enforces a regulatory scheme which prohibits or restricts the commercial taking of certain fish found within Lake Erie waters. Specifically, Ohio bans the commercial fishing of walleye[1] and severely limits the commercial take of yellow perch.[2] Concurrently, Ohio has legislatively insulated sport fisherman from restricting their access to these fish and Ohio's attendant recreation tourist industry has flourished.[3] The purpose and effect of Ohio's regulatory scheme is to apportion access to these fish species for the benefit of local economic and leisure interests to the detriment of interstate commerce. Petitioners contested these Ohio laws in the Northern District of Ohio, Western Division under jurisdiction of 28 U.S.C. 1331, claiming violation of U.S. Const. art. I, § 8, cl. 3.

Under Ohio law, walleye can only be obtained by traveling to Ohio, acquiring a proper fishing permit and catching the fish by hook and line;[4] those unwilling or unable to come to Ohio to catch their fish are precluded from enjoying this national resource.[5] Petitioners assert that

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1 R.C. 1533.63

2 Ohio Admin. Code 1503:31–3–01.

3 Justice Holmes of the Ohio Supreme Court has noted: "The propagation and management of walleye for the recreational taking of the fish in the waters of lake Erie has proven to be a great asset to the state of Ohio, not only to the angler, but also to those serving the needs of this great outdoor sport – such as boat and motor sales and servicing, tackle dealers, marinas, charters, restaurants, and many others." *State v. Port Clinton Fish Co.*, 43 Ohio St. 3d 93 at 95, 538 N.E.2d 1055 (1989), cert. den. 493 U.S. 892 (1989).

4 R.C. 1533.63.

5 Walleye and yellow perch are only available to U.S. residents by import from Canada; Canadian commercial fisherman are permitted under the laws of that nation to fish walleye and yellow perch without serious restriction.

Ohio is hoarding a national resource to favor its local economic and leisure interests.

In granting Respondent's Motion to Dismiss, the District Court was required to accept Petitioner's stated allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69 (1984). Petitioners have contended: (1) Located within the Ohio territorial waters of Lake Erie are certain commercially valuable fish, namely walleye and yellow perch, (2) commercial fisherman have traditionally fished and marketed these species without substantial governmental interference, (3) walleye and yellow perch have traditionally been marketed to various distributors and wholesalers for market outside the State of Ohio, (4) Ohio has legislatively limited or precluded commercial fishermen from taking Lake Erie walleye and yellow perch, (5) Ohio's recreational fishing industry is unable to take its allotment of walleye pursuant to the agreement between the State of Ohio and government of Canada,[6] and (6) Respondents have refused to devise a new scheme to allocate walleye among commercial and sport fishing interests. Petitioners' Complaint at 2-6, *Reynolds, et al. v. Buchholzer, et al.* (No. 93-CV-7520). As this Court noted in *Conley v. Gibson*, 355 U.S. 41 (1957), courts are "without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the appellant can prove no set of facts that would entitle it to relief." Here, Petitioners challenge Ohio's regulatory scheme as commercial

6 Statistics kept by the Lake Erie Walleye Task Group reflect that in 1994 Ohio sport fishermen claimed only 469,000 of the 4,100,000 walleye allotted for Ohio consumption; in 1995 sports fishing claimed 1,435,188 of the 4,626,000 assigned for Ohio and estimates for 1996 suggest Ohio sport fishermen will claim less than 1,435,000 of the approximately 5 million walleye apportioned for Ohio use. Report of Lake Erie Walleye Task Group, March 1996 attached hereto in Appendix B at B-1.

protectionism of Ohio's recreational fishing and tangent industries.

In affirming the decision of the lower court the United States Court of Appeals for the Sixth Circuit held as follows:

> The plaintiffs attempted to evidence discriminatory purpose by suggesting that the actual goal of the statutes was to promote the economic interests of Ohio's tourism industry at the expense of Ohio's commercial fishing industry. It is doubtful that this accusation could be supported; even were it true, the allocation of natural resources among competing user groups "is not per se violative of the Constitution." *Solis*, 524 F. Supp. at 1074 n.6 ("Considering the number of people involved in sport fishing, compared to commercial fishing, the relative impact each has on fish populations, and the comparative economic benefits of both activities, this particular allocation is neither arbitrary nor capricious nor infringes on any fundamental rights.")

Reynolds v. Buchholzer, No. 94-4294 at 5-6 (6th Cir. 1996)(quoting, *Solis v, Miles*, 524 F. Supp. 1069 (1981).

In failing to view the complaint in the light most favorable to Petitioners, the lower courts have disregarded Petitioner's legitimate claims and left unsettled an important area of constitutional law. *Scheurer v. Rhodes*, 416 U.S. 232 (1974). The instant Commerce Clause claim is a case of first impression. The findings of the Sixth Circuit stemmed from unsupported factual conclusions drawn without a factfinding and from an erroneous application of equal

protection precedent to a commerce clause issue.[7] Both the District Court and Sixth Circuit have acknowledged the uniqueness of Petitioner's claim, [8] and Petitioners now seek this Court's review of this important issue regarding States' allocation of natural resources.

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[7] The lower courts here incorrectly relied upon a footnote notation in the Southern District of Texas' decision in *Solis v, Miles*, 524 F. Supp. 1069 (1981). The *Solis* court applied standards of equal protection analysis to allow Texas' prefer competing user groups for economic reasons. Such a conclusion may not be drawn under commerce clause analysis; the commerce clause expressly prohibits economic discrimination.

[8] District Judge Dowd noted in his Memorandum Opinion filed September 26, 1994:

> Plaintiffs argue that the protectionist motive behind the legislation transforms the statute into one which constitutes per se violation of the Commerce Clause. This novel argument asks the Court to circumvent the existing analysis by making new law. Such is not the province of a district court. Rather the Court is bound to follow precedent as set forth by the United States Supreme Court.

Opinion at 5, attached hereto in Appendix at A-8. The Sixth Circuit noted:

> The plaintiffs also advance the novel claim that a discriminatory purpose can be found because the statutes promote Ohio's sport fishing industry at the expense of the United States Food industry."

Reynolds v. Buchholzer, No. 94-4294 (6th Cir. 1996)

REASONS FOR GRANTING THE WRIT

I. THE COMMERCE CLAUSE FORBIDS STATES TO PREFER COMPETING INTEREST GROUPS IN THE ALLOCATION OF ITS NATURAL RESOURCES SO AS TO BOLSTER LOCAL ECONOMICS TO THE DETRIMENT OF INTERSTATE COMMERCE

Ohio enforces Revised Code Section 1533.63 which bans commercial fishing of Lake Erie walleye but allows the taking of walleye by Ohio sport fishing interests.[9] No legislative effort has been made to allocate walleye among these competing interest groups regardless of the species' flourishing population.[10] In addition, the Ohio Department of Natural Resources restricts commercial fishing of yellow perch during the optimal months of March and April yet makes no such restriction on sports fishing.[11] Ohio's law and regulations violate the Constitution's Commerce Clause by favoring sports fishing, and its tangent industries, to the detriment of of the interstate commerce of walleye and yellow perch.

The Commerce Clause confers upon Congress the power "to regulate commerce... among the several states." U.S. Const. art. I, § 8, clause 3. This Clause limits the power of individual states to interfere with interstate commerce

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[9] R.C. § 1533.63 is set forth in Appendix A at A-15.

[10] Petitioner would have demonstrated at trial or in response to a properly filed motion pursuant to Rule 56 of the Federal Rules of Civil Procedure that the increase in the fish population of all species is unrelated to the commercial ban but a result of environmental factors, including pollution control, predator control, weather concerns, etc.

[11] Ohio Admin Code 1503:31-3-01 is set forth in Appendix A at A-21.

even if the legislation involves matters of legitimate local interest. *Minnesota v Clover Leaf Creamery* , 449 U.S. 456 (1981),*Hughes v. Oklahoma*, 441 U.S. 322 (1979), *Solis v. Miles*, 524 F. Supp. 1069 (1981). Thus, the Commerce Clause not only empowers Congress to legislate concerning interstate commerce but also forbids state action which unreasonably burdens interstate commerce. *Id.*

This Court employs a two–part analysis to determine if "resource conservation laws" or "environmental protection laws" impermissibly interfere with interstate commerce. First, when a state law purporting to serve environmental purposes is actually "simple economic protectionism," the Court has applied a "virtually per se rule of invalidity." *Clover Leaf Creamery*, at 471 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Further,

> even if a statute regulates "even–handedly," and imposes only "incidental" burdens on interstate commerce, the Court must nevertheless strike it down if "the burden imposed on commerce is clearly excessive in relation to the putative local benefits." Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Clover Leaf at 471 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also* , *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of State of Oregon*, 114 F. Ct. 11345, 11350 (1994), *Hughes*, at 336, *Philadelphia*, at 624.

Here, Ohio's regulatory scheme fails as shrouded economic protectionism. Ohio forbids commerce of walleye and restricts commerce of yellow perch to all commercial fisherman yet allows nearly unbridled access to the same

resource by sport fishermen.[12] Respondents argue that the Ohio laws survive Commerce Clause challenge because they forbid out-of-state commercial fishing as well as in-state commercial fishing. Petitioners contend the issue is not between commercial fishing interests but between competing industries, including the United States food industry. Clearly, Ohio is protecting local natural resources for its own economic interest and that of its citizenry.[13] The Commerce Clause, however, forbids states to limit access to a national resource for their own economic interests.

A State's authority to regulate the taking of fish found within its territorial waters is not absolute. *Missouri v. Holland*, 252 U.S. 416, 434 (1920); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). Although States have long regulated the consumption of its resources, this Court determined that "[s]tates do not 'own' the free–swimming creatures found within their territorial limits in any conventional sense of that term." *Holland*, at 434, *Manchester v. Commonwealth of Massachusetts*, 139 U.S, 240 (1891). Further, this Court has repeatedly ruled that:

> [...] States may promote [their] legitimate [conservation] purpose only in ways consistent with the basic principal that "our

[12] Although Ohio's Department of Natural Resources may seasonally restrict the recreational fisherman take limit for individual fish per day, there is no limit on the number of sport fishing licenses the State may issue.

[13] Respondents acknowledged Ohio's interests in economic protectionism in its brief to the Sixth Circuit where counsel noted: "[...] the efficient management of walleye, yellow perch, and other fish targeted by the regulations might lead to an enhanced recreational fishing on Lake Erie, to the benefit of all who fish there." *See also Justice Holmes opinion in Port Clinton Fish Co.*, 43 Ohio St. 3d 93 at 95, 538 N.E.2d 1055 (1989), *cert. denied*, 493 U.S. 892 (1989).

> economic unit is the nation," *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537, 69 S. Ct. 657, 665, (1949), and that when a wild animal becomes an article of commerce... [i]ts use cannot be limited to the citizens of one state to the exclusion of citizens of any other state.

Hughes v. Oklahoma, at 338, (quoting from *Geer v. Connecticut*, 161 U.S. 519 538 (1896)(Field, J., dissenting).

Ohio's reservation of walleye and yellow perch for local anglers is violative of the commerce clause because it operates to bolster local economics and preclude the nation from accessing a natural resource. Access limitations to Lake Erie fish is akin to the State of Florida banning commerce of its orange crop or the State of Maine from banning the commercial trade of its famous lobsters. These state natural resources are traditional items of commerce and unique national resources to which all Americans are entitled access.

In reviewing the design and impact of Ohio statutory scheme, this Court is not restrained by legislative purposes claimed by Ohio. "When considering the purpose of a challenged statute, this Court is not bound by [t]he "name, description or characterization given by the legislature or the courts of the state, but will determine for itself the practical impact of the law." *Hughes v. Oklahoma*, at 335, quoting from *LaCoste v. Louisiana Department of Conservation*, 363 U.S. 545, 550 (1924).

Petitioners' seek to demonstrate that the purpose and effect of Ohio law is economic protectionism, not conservation, and their Complaint allegations should have been be construed as true. *Hishon v. King & Spalding*, 467

U.S. 69 (1984). Ohio is charged as trustee of the waters of Lake Erie yet guards its plentiful resources for its own benefit and as an attraction for Ohio tourism. The commerce clause has been interpreted to prohibit favoritism of a state's economic interest over interstate trade of a national resource. No federal court has considered whether the commerce clause prohibits states from preferring local user groups over interstate commercial user groups who both compete for natural resources. Certiorari is appropriate.

II. THE COMMERCE CLAUSE PROHIBITS A STATE FROM ALLOCATING A PLENTIFUL NATURAL RESOURCE UNDER THE GUISE OF CONSERVATION WHEN THE BURDEN ON INTERSTATE COMMERCE IS CLEARLY EXCESSIVE IN RELATION TO THE PUTATIVE LOCAL BENEFITS OCCASIONED BY THE STATE'S REGULATORY SCHEME AND WHEN LESS BURDENSOME MEASURES ARE CLEARLY AVAILABLE

The Respondents maintain that Ohio's statutory scheme must be analyzed under the second prong of Commerce Clause scrutiny. They argue that Ohio's laws serve a legitimate local purpose and treat in–state and out–state commercial fishing interest alike, and therefore, any review must be considered pursuant to the *Pike v. Bruce Church, Inc.* balancing test.

Petitioners alternatively contend that Ohio's regulations fail commerce clause analysis under the second test articulated in *Pike v. Bruce Church* as well as being per se invalid as economic protectionism. *Pike* at 142., *Clover Leaf,* 449 U.S. 456 (1981). Specifically, Ohio has failed in its

constitutional duty to strike a palatable balance between its purported interest in conservation and the mandate of commerce. The Pike balancing test states:

> Where the statute regulates even–handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Company v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike at 142.

Even assuming Ohio promotes legitimate conservation interests even-handedly, the law's effects on commerce are clearly excessive in relation to their putative local benefits. Petitioners have alleged that Lake Erie's fish stock is plentiful and that the sport fishermen are virtually free to take the entire allocation of walleye as distributed between the Ohio and Canadian governments. Ohio law bans commercial fishermen from accessing this resource and out-of-state restaurateurs and wholesalers are frustrated from marketing Lake Erie fish.

Ohio's legislative control over access to Lake Erie fish is arbitrary and excessive and less burdensome alternatives are readily apparent. Rather than terminate commerce, Ohio must allocate the fish distribution among sports and commercial fishermen. For example, Ohio could limit the

policing of commercial harvests or provide separate seasons for sport and commercial fishing, or restrict commercial fishing to certain areas of Lake Erie. Although Ohio may reasonably regulate a species in the interest of conservation, the allocation of some of those fish to one interest group to the detriment of another is clearly excessive and violative of the commerce clause. Certiorari is therefore appropriate.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

Jeffrey C. Zilba

EDITOR'S NOTE

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

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No. 94-4294

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANK REYNOLDS, d/b/a Reynolds Fisheries; PORT CLINTON FISH COMPANY; JAMES MARICQUE,
Plaintiffs-Appellants,

v.

FRANCES S. BUCHHOLZER, Director of Ohio Department of Natural Resources; RICHARD B. PIERCE, Chief of the Division of Wildlife; GEORGE B. VOINOVICH, Governor of the State of Ohio,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed July 1, 1996

Before: KEITH and SILER, Circuit Judges; GIBBONS, Chief District Judge.*

SILER, Circuit Judge. Frank Reynolds, a commercial fisherman, Port Clinton Fish Company, a fish distributor, and James Maricque, a Wisconsin restaurateur [collectively "the plaintiffs"], appeal the district court's dismissal of their cause of action. The plaintiffs filed a claim for declaratory and injunctive relief against the Ohio Department of Natural Resources ["ODNR"]. They argue that the Ohio statutes and regulations ["the statutes"][1] that limit or preclude the commercial fishing of walleye and yellow perch are unconstitutional because they violate the Commerce Clause of the United States Constitution. The district court granted ODNR's motion for dismissal. For the reasons stated herein, we affirm the district court.

The Commerce Clause confers upon Congress the power "to regulate Commerce . . . among the several States." U.S. Const. art. I., § 8, cl. 3. Among other things, this clause limits the power of individual states to interfere with interstate commerce even if the legislation involves matters of legitimate local concern. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *see also Oregon*

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* The Honorable Julia S. Gibbons, Chief United States District Judge for the Western District of Tennessee, sitting by designation.

[1] OHIO REV. CODE ANN. § 1533.63 provides,

> No licensed commercial fisherman . . . shall take walleye . . . from Lake Erie or its tributaries, or possess such fish aboard a boat used in commercial fishing. . . . Walleye . . . originating from outside of this state may be possessed for sale. . . . No person shall trade, buy, sell, possess, or transport for sale walleye . . . taken from waters in this state.

OHIO ADMIN. CODE § 1501:31-3-01 provides that "it shall be unlawful for any person to take or attempt to take yellow perch . . . with any commercial fishing device in the Lake Erie fishing district except from May first to December thirty-first of each year."

Waste Sys., Inc. v. Department of Envtl. Quality of State of Or., 114 S. Ct. 1345, 1349 (1994) ("[The Commerce Clause] denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."). State fish and wildlife laws are within the reach of the Commerce Clause; they cannot unjustifiably interfere with interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979); *see also Clover Leaf*, 449 U.S. at 471 (noting that the Commerce Clause limits environmental protection and resource conservation laws).

The Supreme Court has constructed a two-part framework to determine if "resource conservation laws" or "environmental protection laws" impermissibly interfere with interstate commerce. First, when a "state law purporting to promote environmental purposes is in reality 'simple economic protectionism,' [the courts] have applied a 'virtually per se rule of invalidity.'" *Clover Leaf*, 449 U.S. at 471 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Otherwise, the courts are to employ a balancing test:

> Even if a statute regulates "evenhandedly," and imposes only "incidental" burdens on interstate commerce, the courts must nevertheless strike it down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Clover Leaf, 449 U.S. at 471 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *see Oregon Waste*, 114 S. Ct. at 1350 (affirming standard); *Hughes*, 441 U.S. at 336 (same); *Philadelphia*, 437 U.S. at 624 (same).

Thus, this court must first determine if the statute in question constitutes "simple economic protectionism." Economic protectionism can be proved by showing

discriminatory effect or discriminatory purpose. *Clover Leaf*, 449 U.S. at 471 n.15. As used in the Commerce Clause context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*, 114 S. Ct. at 1350; *see, e.g., id.* ("It is well-established . . . that a law is discriminatory if it 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'") (quotations omitted); *City of Philadelphia*, 437 U.S. at 627 ("[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders."); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 285-86 (1977) (criticizing discriminatory fishing regulations); *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1307 (2d Cir. 1994) ("Provided a state does not discriminate against non-residents, however, it may impose incidental burdens on interstate commerce when exercising its police power to promote safety or general welfare.").

In the instant case, the statute does not distinguish in-state fishermen from out-of-state fisherman. As the district court stated,

> The statute and regulations in issue here cannot be interpreted as favoring local enterprise and intentionally discriminating against interstate commerce. Indeed, those most adversely affected are members of the local commercial fish industry. No Ohio industry is placed in a better position by the fishing restrictions than any similar out-of-state commercial fisherman. Commercial fishing of walleye has been banned to all. If anything, the restrictions act as a boon to out-of-state fisherman who may market their walleye in Ohio without local competition.

Hosko v. Teater, No. C80-542 (N.D. Ohio Mar. 25, 1985) (adopting Magistrate Judge's report and recommendation), *quoted in Ohio v. Port Clinton Fish Co.*, 538 N.E.2d 1055, 1057 (Ohio), *cert. denied*, 493 U.S. 892 (1989); *see also*

Ohio Fish Producers Ass'n v. Teater, No. C82-363 (N.D. Ohio Feb. 12, 1982) (finding no discrimination in application of similar statutes); *cf. Solis v. Miles*, 524 F. Supp. 1069, 1075 (S.D. Tex. 1981) (agreeing that similar Texas statute is not discriminatory).

The plaintiffs attempted to evidence discriminatory purpose by suggesting that the actual goal of the statutes was to promote the economic interests of Ohio's tourism industry at the expense of Ohio's commercial fishing industry. It is doubtful that this accusation could be supported;[2] even were it true, the allocation of natural resources among competing user groups "is not per se violative of the Constitution." *Solis*, 524 F. Supp. at 1074 n.6 ("Considering the number of people involved in sport fishing, compared to commercial fishing, the relative impact each has on fish populations, and the comparative economic benefits of both activities, this particular

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[2]In *Clover Leaf*, the Minnesota legislature passed a statute that banned retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitted sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons. *Clover Leaf*, 449 U.S. at 458. Ostensibly passed to solve the solid waste management problem caused by nonrecyclable milk containers, the statute also had the effect of "promot[ing] the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." *Id.* at 460. The Supreme Court responded by "assum[ing] that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" *Id.* at 471 n.15 & 463 n.7 (quotation omitted).

Regarding the statutes at issue, the Ohio Supreme Court has confirmed that the legislative purpose is "[o]bviously . . . protection and conservation of wildlife, a legitimate state interest." *Port Clinton Fish Co.*, 538 N.E.2d at 1057. With the deference given to the stated goals of legislation, the plaintiffs would have a difficult time proving that the Ohio legislature was motivated by other ends.

allocation is neither arbitrary nor capricious nor infringes upon any fundamental rights.").[3]

Because the statutes cannot be classified as simple economic protectionism, "the controlling question is whether the incidental burden imposed on interstate commerce by [the statutes] is 'clearly excessive in relation to the putative local benefits.'" *Clover Leaf*, 449 U.S. at 472 (quotation omitted). The parties concede that these regulations were promulgated pursuant to Ohio's legitimate police power to efficiently manage its fisheries. *See Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 390 (1978); *New York Trawlers*, 16 F.3d at 1309-10 ("The interest of a state in regulating the taking of its fish and wildlife resources has been long established."). The local benefits of the law would appear to outweigh any burden imposed on interstate commerce: "Even granting that the [food industry or commercial fishing industry] is burdened relatively more heavily than the [sport fishing industry], we find that this burden is not "clearly excessive" in light of the substantial state interest in promoting conservation of . . . natural resources." *Clover Leaf*, 449 U.S. at 473.

The plaintiffs argue, however, that the statutes no longer promote conservation. Rather, they assert that the statutes exist to benefit sport fisherman.[4] Assuming *arguendo* the

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[3]The plaintiffs also advance the novel claim that a discriminatory purpose can be found because the statutes promote Ohio's sport fishing industry at the expense of the United States food industry. While containing a more apparent interstate commerce claim, this argument fails for the same reasons.

[4]The plaintiffs argue that while the original purpose of the regulation may have been to preserve the species from extinction, the adverse ecological impact to preclude the taking of walleye is no longer viable. This question is better submitted to the legislature. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom . . . of legislative policy determinations.").

truth of this notion,[5] statutes or regulations that favor sport fishing over commercial fishing may themselves reflect legitimate state interests. *See Port Clinton Fish Co.*, 538 N.E.2d at 1057-58 (Holmes, J., concurring); *Burns Harbor Fish Co., Inc. v. Ralston*, 800 F. Supp. 722, 731 (S.D. Ind. 1992). Consequently, the plaintiffs are unable to show that the commercial fishing restrictions excessively burden interstate commerce relative to the local benefits.

The plaintiffs are unable to show either that the statutes are "simple economic protectionism" or that the burden imposed on interstate commerce by the statutes is "clearly excessive." These commercial fishing restrictions are thus within the limits imposed on Ohio by the Commerce Clause.

AFFIRMED.

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[5]Ohio courts have determined that similar statutes and regulations are legitimate "conservation measures" within the police power of the state of Ohio. *See e.g., Port Clinton Fish Co.*, 538 N.E.2d at 1056-57; *Salasnek Fisheries, Inc., v. Cashner*, 224 N.E.2d 162, 164 (Ohio Ct. App. 1967).

DOWD, J.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

FRANK REYNOLDS, etc., et al.,

Plaintiff,

-vs-

FRANCES S. BUCHHOLZER, Director etc., et al.,

Defendant.

Case No. 3:93 CV 7520

MEMORANDUM OPINION

This matter is before the court on defendants' motion to dismiss, plaintiffs' opposition, and defendants' reply thereto. This Court has jurisdiction pursuant to 28 U.S.C. Section 1331.

BACKGROUND

Frank Reynolds ("Reynolds") is an Ohio resident and a commercial fisherman. Port Clinton Fish Company ("Port Clinton") is a commercial enterprise engaged in the purchase and wholesale distribution of fresh fish. James Maricque ("Maricque") is a restaurateur and is also a wholesaler of fresh fish. All three of these plaintiffs bring this action against Frances S. Buchholzer ("Buchholzer"), Director of the Ohio Department of Natural Resources, Richard B. Pierce ("Pierce"), Chief of the Division of Wildlife of the Ohio Department of Natural Resources, and George B. Voinovich ("Voinovich"), Governor of the State of Ohio.

In the early 1970's the Ohio legislature empowered the defendants to limit the commercial fishing of walleye, yellow perch, and bass. Ohio Rev. Code Section 1533.63. In 1992, plaintiffs contend that defendant pierce promulgated rules to limit the taking of yellow perch by commercial fisherman. Ohio Administrative Code Section 1501:31–3–02. In addition, the Ohio statute precludes commercial fishing of walleye.

Plaintiffs argue that Ohio Rev. Code Section 1533.63 is unconstitutional as violates the Commerce Clause. Furthermore, they state that regulations constitute economic protectionism. Plaintiffs request that the Court find Ohio Rev. Code Section 1533.63 and Ohio Admin. Section 1501:31–3–02 as unconstitutional as well as precluding enforcement of the state statute and regulations. Defendants have moved for dismissal under Fed. R. Civ. P. 12(b)(6).

MOTION TO DISMISS

In deciding a motion to dismiss under Rule 12(b) Fed R. Civ. P., the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, Hishon v. King & Spalding, 467 U.S. 69 (1984), while viewing the complaint in a light most favorable to the plaintiffs. Scheuer v. Rhodes, 416 U.S. 232 (1974); Westlake v. Lucas, 537 F. 2d 857, 858 (6th Cir. 1976). The Court is without authority to dismiss the claims unless it can be demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. Conley v. Gibson, 355 U.S. 41 (1957); Westlake, supra, at 858. See Generally 2A J. Moore, W. Taggert & J. Wicker, Federal

Practice, paragraph 12.08 (2d ed. 1985).

Plaintiffs' position is simple. They contend that the statute and regulations prohibiting commercial walleye fishing and limiting the season for commercial perch fishing are unconstitutional as they violate the Commerce Clause[1] under the United States Constitution. Plaintiffs argue the statute and regulations constitute economic protectionism which benefits the State of Ohio.

The Supreme Court in Maine v. Taylor, 477 U.S. 131 (1986) set forth a cogent analysis to be applied to state regulations when challenged under the Commerce Clause:

> In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in Hughes v. Oklahoma, 441 U.S., at 336, that once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory

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[1] The Commerce Clause vests legislative powers in a Congress:

> [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;

U.S. Const. Art.I, Section 8, cl.3.

means.

Id. at 138. (Citations omitted.)

The Supreme Court in Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) distinguished between "outright protectionism" and "more indirect burdens on the free flow of trade" as follows:

> The Court has observed that "where simple economic protectionism is effected by state legislation, a virtual per se rule of invalidity has been erected." . . . In contrast, legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn.

Id. at 37. (Emphasis added.)

The starting point of the Court's analysis is whether or not the Ohio Rev. Code Section 1533.63 or Ohio Administrative Code Regulations are discriminatory on their face or in practical effect. Ohio Rev. Code Section 1533.63 states in pertinent part:

> No licensed commercial fishermen, or person required to have a commercial fishing license under section 1533.34 of the Revised Code shall take walleye . . . or other species protected by Chapters 1531 and 1533. of the Revised Code, or division of wildlife order . . .
>
> Walleye or sauger originating from outside of this state may be possessed for sale, bought, or sold subject to orders of the division of wildlife.
>
> No person shall trade, buy, sell, possess or transport for sale walleye or sauger taken from waters in this state . . .

Ohio Administrative Code Section 1501:31–3–01 states in

pertinent part:

> (B) it shall be unlawful for any person to take or attempt to take fish from any commercial fishing device, or to set, maintain, or bait any such device in the lake Erie fishing district except from March first to December tenth each year. Provided further, it shall be unlawful for any person to take or attempt to take yellow perch (PERCA FLAVESCENS [sic]), with any commercial fishing device in the lake Erie fishing district except from May first to December tenth of each year.

Reviewing the statute and regulations at issue, it is clear that they not constitute facial discrimination. Instead, the ban of commercial fishing and sale of walleye applies equally to fishermen both within and outside of Ohio's borders. No benefit accrues to Ohio's commercial fishing industry as a result of the statute. Furthermore, the statute allows for the sale of walleye caught outside of Ohio's borders, assuming that the legal length requirements are met.

Plaintiffs argue that the protectionist motive behind the legislation transforms the statute into one which constitutes per se violation of the Commerce Clause. This novel argument asks the court to circumvent the existing analysis by making new law. Such is not the province of a district court. Rather, the Court is bound to follow precedent as set forth by the United States Supreme Court.

While the Court finds that the statute and regulations do not discriminate on their face, it also finds that there is no discrimination in practical effect. See also, State v. Port Clinton Fish Co., 43 Ohio St. 3d 93, 94, 538 N.E. 2d 1055, cert. denied, 493 U.S. 892 (1989).

The next phase of the analysis centers on whether the

"burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The inquiry then becomes whether the statute serves a legitimate local purpose. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

Defendants argue that the furtherance of Ohio's fish management programs and the management of wildlife within a state's borders constitutes a legitimate purpose of regulations. Hughes v. Oklahoma, 441 U.S. 332. In addition, defendants contend that the effective management of walleye and yellow perch enhance recreational fishing to those Ohioans and out of state recreational fishermen.

In contrast, plaintiffs assert that the conservation purpose enunciated by defendants at the outset of the legislation, has changed. Because the walleye and perch are so plentiful, the recreational fishermen cannot catch their full allocation of fish such that the factual circumstances are markedly changed and do not support the conservation purpose under which the legislation was enacted.

The Ohio Supreme Court in State v. Port Clinton Fish Co., 43 Ohio St. 3d 95, 538 N.E. 2d 1055, cert. denied, 493 U.S. 892 (1989), found that the protection and propagation of walleye in Ohio was a basis for a legitimate state interest and did not violate the Commerce Clause. Absent a change in constitutional law principles, the court does not accept the notion that constitutionality of a law changes over time. The Court finds that the second element of the Pike test is met.

The third element considered is "whether alternative means could promote this local purpose as well without discriminating against interstate commerce." Pike v. Bruce

Church, 397 U.S. at 142. It is apparent that the statute and regulations at issue impact minimally upon interstate commerce at best. The rules apply to both in-state and out of state commercial fisherman and do not discriminate upon interstate commerce.

Accordingly, the Court finds that as a matter of law, Ohio Revised Code Section 1533.63 and Ohio Administrative Regulations Section 1501.31-3-01, 02, and 03 do not violate the Commerce Clause, under Article 1, Section 8, clause 3 of the United States Constitution. Defendants' motion to dismiss is therefore granted.[2]

IT IS SO ORDERED.

DAVID D DOWD, JR.
U.S. DISTRICT JUDGE

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[2] Defendants also move for dismissal against plaintiffs Port Clinton and Reynolds on the basis of res judicata. Assuming the court were to grant the motion on res judicata grounds, an analysis under the Commerce Clause is still necessary as to defendant Maricque. Therefore, given the above determination the Court finds it unnecessary to address these arguments.

1533.63 Legal length and weight of certain fish; records to be kept; penalties.

Except as otherwise provided by division of wildlife orders, no person shall take, catch, buy, sell, transport or possess a whitefish less than seventeen inches in length, a sturgeon less than forty–eight inches in length, a catfish less than fifteen and one–half inches in length, a yellow perch less than eight inches in length, a yellow perch fillet or pat fillet of not less than five and three–eighths inches in length, a white bass or bullhead less than nine inches in length, a cisco less than eleven inches in length, a buffalo fish less than fifteen inches in length, a sucker less than ten inches in length, or a coho less than twenty–five inches in round length or twenty–one and one–half inches when headless. All such fish caught or taken of a weight or length less than that prescribed in this section or as may be provided by the chief of the division of wildlife shall be immediately released with as little injury as possible while the net, seine, trotline, dip net, or other fishing device is being lifted, pulled, or hauled.

No person shall release such undersized fish or species protected by Chapters 1531. and 1533. of the Revised Code or division order, into a privately owned pond, lake, live car, or other enclosure; nor shall they bring ashore, or possess aboard a boat used in commercial fishing when going to or returning from nets or other fishing devices, a fish with its head or tail removed or in such condition that its length, weight, or species cannot be determined.

This section does not prohibit the catching, taking, or

possession of such undersized fish when caught or taken with hook and line, other than a commercially licensed trotline, but when such fish are so taken they cannot be bought or sold.

No licensed commercial fishermen, or person required to have a commercial fishing license under section 1533.34 of the Revised Code, shall take walleye, sauger, whitefish, mooneye, cisco, burbot, sturgeon, blue pike; or brook, brown, rainbow, and lake trout; or coho, chinook and kokanne salmon; or other species protected by Chapters 1531. and 1533. of the revised Code, or division of wildlife order, from Lake Erie or its tributaries, or possess such fish aboard a boat used in commercial fishing when going to or returning from nets or other fishing devices. All such fish caught or taken from a commercial fishing device shall be immediately released with as little injury as possible while the fishing device is being lifted, pulled, or hauled.

No person shall take, buy, sell, barter, give away, deliver, ship, transport, or possess any package, container, or quantity with more than ten per cent by weight of undersized fish shall be confiscated along with its containers. No person shall buy, sell, offer for sale, transport, give away, barter, or possess a fish caught or taken out of season or in any manner prohibited, or a fish caught or taken unlawfully from in or outside the state. All fish brought into the state from another state or country shall be subject to the laws of this state.

All fish taken or caught from Ohio waters shall be

brought into an Ohio port for inspection. No person shall ship, carry, transport, or cause to be transported, any fish taken or caught from Ohio water(17) directly to a point outside the state.

Walleye or sauger originating from outside of this state may be possessed for sale, bought, or sold subject to orders of the division of wildlife.

No person shall trade, buy, sell, possess, or transport for sale walleye or sauger taken from waters in this state.

Each person who holds a permit under section 1533.301 or 1533.631 of the Revised Code shall keep accurate written records in the English language of all sales and purchases of freshwater fish. The record shall include the name and address of the buyer and seller, name of fish, the amount of fish in pounds, and the date of sale or purchase. Records for trout, bullhead, herring, whitefish, sauger, walleye, yellow perch, white bass, sturgeon, and channel catfish, shall be kept on forms provided by the chief. In lieu of keeping the written records concerning sales of freshwater fish as required under this division, a permit holder may, upon applying to the chief of the division of wildlife and approval of the chief of the division of wildlife, keep such sales information required under this division o normal business records, including, but not limited to receipts and invoices. All records shall be maintained for at least one year and shall be open to inspection to all division of wildlife officers at all reasonable hours. A buyer who purchases fish for his own consumption shall not be required

to keep records, and persons selling fish for personal consumption shall not be required to record the names and addresses of person purchasing such fish.

No person shall fail to comply with any provision of this section or division order adopted pursuant thereto.

In addition to other penalties provided in the Revised Code, the license of any person who is convicted of two violations of this section, other than those relating to ten per cent by weight of undersized fish, which violations occurred within a twelve-month period, is suspended upon such conviction by operation of law for a period of sixty fishing season days immediately following such second conviction.

In addition to other penalties provided in the Revised Code, the license of any person who is convicted of three or more violations of this section, other than those relating to ten per cent by weight of undersized fish, which violations occurred within a twelve-moth period, is suspended upon such conviction by operation of law for a period of eighteen fishing season months immediately following such third or subsequent convictions.

In addition to other penalties provided in the revised Code, the license or permit of any person who is convicted of two violations of this section relating to walleye or sauger is suspended upon such conviction by operation of law for a period of twenty days immediately following such second conviction.

In addition to other penalties provided in the Revised Code, the license or permit of any person who is convicted of three violations of this section relating to walleye or sauger is suspended upon such conviction by operation of law for a period of sixty days immediately following such third conviction.

In addition to other penalties provided in the Revised Code, any person who is convicted of four violations of this section relating to walleye or sauger imported from without the state, which violations occurred within a period of thirty–six months, is upon such conviction prohibited, by operation of law, from transporting, buying, selling, or dealing in walleye and sauger for a period of sixty months immediately following such fourth conviction.

In addition to other penalties provided in the Revised Code, the license or permit of any person who is convicted of four violations of this section relating to walleye or sauger, other than walleye or sauger imported from without the state, is revoked upon such fourth conviction by operation of law, and the person is permanently barred from obtaining another license or permit of the type revoked.

In addition to other penalties provided in the Revised Code, the license of any person who is convicted of three or more violations of this section relating to ten per cent by weight of undersized fish, which violations occurred within a twelve–month period, is suspended upon such conviction by operation of law for a period of twenty fishing season days immediately following such third or subsequent conviction.

During any period of suspension or revocation no person shall use or engage in fishing with commercial gear owned, used, or controlled at the time of conviction by the licensee whose license or permit has been suspended or revoked.

As used in this section, "sale of fish" includes, but is not limited to, fish sold in the round or part thereof, and includes fish sold as part of a meal or service, but does not include canned fish.

For purposes of determining any license or permit suspension or revocation required by this section, multiple convictions resulting from violations of this section, which violations occurred at the same time, on the same day, at the same location, are deemed to be a single conviction of one violation.

HISTORY: 1984 H 127. eff. 3–27–84
1974 S 532; 1973 S 35; 131 v H 577, S 194; 130 v H 573.
H 505; 128 v. 1152; 1953 H 1; GC 1429

Ohio Admin. Code § 1501:31–3–01. Commercial fishing seasons.

(A)In the lake Erie fishing district, it shall be unlawful for any person to take or attempt to take fish from a seine, or to set, maintain, or bait a seine except from March first to June fourteenth and from the Wednesday following Labor day to December tenth each year.

(B)It shall be unlawful for any person to take or attempt to take fish from any commercial fishing device, or to set, maintain, or bait any such device in the lake Erie fishing district except from March first to December tenth each year. PROVIDED FURTHER, IT SHALL BE UNLAWFUL FOR ANY PERSON TO TAKE OR ATTEMPT TO TAKE YELLOW PERCH (PERCA FLAVESCENS), WITH ANY COMMERCIAL FISHING DEVICE IN THE LAKE ERIE FISHING DISTRICT EXCEPT FROM MAY FIRST TO DECEMBER TENTH OF EACH YEAR.

(C)It shall be unlawful for any person to take or attempt to take fish by any commercial fishing method without first complying with the licensing provisions of Chapter 1533. of the Revised Code and this chapter.

(D)All definitions set forth in rule 1501:31–1–02 of the Administrative Code shall apply to this rule.

Effective: NOVEMBER 11, 1992

Ohio Admin Code § 1501:31–3–02 Legal length and weight of certain fish.

Under authority of section 1533.63 of the Revised Code and division (D) of section 1531.08 of the Revised Code, the chief of the division of wildlife hereby orders that throughout the state:

(a) It shall be unlawful for any person to sell, buy, transport, take, catch, or possess channel catfish (*Ictalurus punctatus*) less than fifteen and one–half inches in length, a yellow perch (*Perca flavescens* and *perca fluviatilis*) less than eight an one–half inches in length, a yellow perca fillet or part fillet less than five and five–eighths inches, a headless yellow perch less than six and seven–eighths inches in length, a white bass (*Morone chrysops*) or white bass hybrids (*M. chrysops x R. Americanus*) less than eleven inches in length, a headless white bass or white bass hybrid less than eight and three–fourths inches in length, a white bass or white bass hybrid fillet or part thereof less than six and one–half inches in length, a walleye (Stizostedion vitreum vitreum)less than fifteen and one–half inches in length, a walleye fillet or part fillet of a length less than nine and one–half inches, a headless walleye less than twelve and one–fourth inches in length, a bullhead (*Ictalurus melas, I. natalis and Nebulosus species*) less than nine inches in length, a white fish (*Coregonous sp.*) less than seventeen inches in length. Suckers and buffalo fish of any size may be bought and sold. Except as provided in paragraph (E) of this rule, all such fish caught or taken of a weight or length less than prescribed in this rule, and all fish that cannot be taken in Ohio waters by commercial fishing devices, shall be released back to the water immediately with as little injury as possible while the fishing device is lifted, hauled or operated.

(B) It shall be unlawful for any person to release any species of protected or undersized fish prescribed in this rule into a privately owned pond, lake, live car, or other enclosure.

(C) It shall be unlawful for any person to bring

ashore, or possess aboard a boat used in commercial fishing, a fish mentioned in this rule with its head or tail removed or in such condition that its length, weight, or species cannot be determined.

(D) This rule does not prohibit the catching, taking, or possession of undersized fish when caught or taken with hook and line, other than a commercial trotline, but when such fish are taken they cannot be bought or sold; provided that (sic) no person shall possess such undersized fish, or a species not permitted to be taken commercially, aboard a boat going to, while on, or when returning from commercial fishing devices.

(E) It shall be unlawful for any person to take, possess, sell, buy, transport, or cause to be transported, a quantity, container, boat load, catch or haul or any species of fish referred to in this rule containing more than ten per cent by weight of undersized round, filleted or headless fish.

(F) It shall be unlawful for any person to take, by the aid of commercial fishing gear, blue pike, sauger, sturgeon, brook, brown, rainbow, and lake trout; or coho, chinook, and pink salmon; burgot; cisco; or mooneye from lake Erie or its tributanes or to possess any of the aforementioned species on a boat going to or returning from commercial fishing.

(G) Lake trout; sauger, sturgeon, except lake sturgeon (*Acipenser fulvenscens*); coho, chinook, and pink salmon; cisco, except lake herring (*Coregeonus artedii*) legally acquired from out of the state may be sold, bought, and possessed except as otherwise provided in this paragraph. It shall be unlawful for any person to buy, sell, or possess a sauger less than eleven inches in length, or sauger fillet of a weight less than three ounces, or a part fillet of a weight less than one and one–half ounces; a sturgeon, except lake sturgeon, less than forty–eight inches in length; a cisco, except lake herring, less than eleven inches in length.

(H) It shall be unlawful for any person to take, possess, buy, sell, deliver, transport, ship, trade or give

away, walleye (*Stizostedion vitreum vitreum*) or part thereof, including roe, taken from Ohio waters of lake Erie and its tributaries when taken by the aid of commercial fishing gear.

(I) It shall be unlawful for any person to possess a walleye (*Stizostedion vitreum vitreum*) or part thereof, including roe, upon or in any boat, used in licensed commercial fisheries while such boat is going to, when on, or when returning form commercial fishing devices.

(J) It shall be unlawful for any person to buy, sell, or trade walleye (*Stizostedion vitreum vitreum*) taken from the Ohio waters of lake Erie and its tributanes.

(K) It shall be unlawful for any person to possess or transport aboard a boat a quantity of walleye (Stizostedion vitreum vitreum) in excess of the daily bag limit per licensed angler as specified in paragraph (A) of rule 1501:31–13–08 of the Administrative Code, except a nonresident transportation permittee may transportation permittee may transport a quantity of walleyes when in conformity with sections 1533.301 and 1533.63 of the Revised Code.

(L) A violation of the length, weight, and species of fish required of this rule is a violation of section 1533.63 of the Revised Code.

(M) All provisions in section 1533.63 of the Revised Code not mentioned in, or modified by this rule, shall remain in effect.

(N) "headless" for this rule shall mean the length of a fish from the tip of the tail to the point where the head was removed.

(O) It shall be unlawful for any person to sell, buy, offer for sale, possess, or transport for sale fish which have a length or weight limit, in any form other than round, headless or as fillets, except salmons (*Salmo species*) and white–fishes (*Coregonus species*) may be sold in steak form or canned and channel catfish (*Ictalurus puntatus*) may be sold

in nugget and strip form.

(P) Persons processing fish in any county adjacent to lake Erie and in accordance with section 1533.56 of the Revised Code, shall not be required to keep records which are prescribed by 1533.56 of the Revised Code.

(Q) Al definitions set forth in rule 1501:31–1–02 of the Administrative Code shall apply to the rule.

HISTORY: 1992–93 OMR 1280(A), eff. 6–7–93
1991–92 OMR 335(A), eff. 10–20–91: 1987–88 OMR 163 (A). eff. 9–15–87: 1984–85 OMR 255 (A). eff. 9–17–84: 1983–84 OMR 1029 (A). eff 5–3–84: 1981–82 OMR 536 (A). eff. 2–28–82: 1980–81 OMR 334 (A). eff. 1–2–81: 1979–80 OMR –585 (A). eff. 3–1–80: 1978–79 OMR –64 (A). eff. 8–30–78: prior NR w–3–02

Ohio Admin. Code § 1501:31–3–03 Limited entry of commercial fishermen; commercial fishing licenses.

(A) only those persons previously issued a commercial fishing license by the chief or his authorized agent, or a commercial fishing license transferred by the chief or his authorized agent, or a license in reserve in the prior fishing season will be issued a commercial fishing license by the chief or his authorized agent, provided that they have made proper application and paid the required fees on or before the first day of the current season for the type of commercial gear sought to be licensed. In the case of a license transferred during the commercial fishing season the transferor and transferee must have made proper applications and paid the required fees before the transfer was effective, provided such persons have complied with the necessary provisions in Chapters 1531. and 1533. of the Revised Code and division of wildlife orders in previous fishing seasons.

(1) Additional units of trap nets as provided for in section 1533.35 of the Revised Code will only be issued to persons who had a license for the additional units of trap nets, or held them in reserve pursuant to paragraph (A)(2) of this rule, in the previous fishing season.

(2) The chief may grant a written request to place a license or additional units of trap nets in reserve without payment for a maximum of five years. The five year period will begin on the first day of a new season for the type of commercial gear for which a license had been issued during the prior fishing season; or, in the case of additional units of trap nets, the year in which such gear was last licensed. During such five year period, no other person will be issued the license or additional units of trap nets held in reserve. A license shall not be permitted to take his license out of reserve in the same year that it is reserved. Licenses may be placed in reserve or taken out of reserve only during the closed commercial fishing season.

(3) Any license issued pursuant to paragraph (A) of

this rule shall be for the same type and amount of gear that was licensed in the previous fishing season, except: A person, including those presently holding a license may be issued a transferred license in the same manner as a new applicant.

(4) A person who held a license in the previous year but does not obtain or apply for the same type of license, or place it in reserve on or before the first day of the commercial fishing season, for such license will lose his right to review such license and will have to apply as a new applicant.

(5) All licenses or additional units of trap nets not renewed or placed in reserve by previous licenses, and any licenses which have been denied or revoked, may be reissued to a new applicant.

(B) This rule does not apply to trotline, dip net, and carr apron licenses. Applications for such licenses shall be made in accordance with requirements prescribed in Chapters 1531. and 1533. of the Revised Code.

(C) All provisions in section 1533.342 of the Revised Code not mentioned in or modified by this rule shall be in effect.

(D) A violation of this rule is a violation of section 1533.342 of the Revised Code.

(E) All definitions set forth in rule 1501:31–1–02 of the Administrative Code shall apply to this rule.

HISTORY: 1988–89 OMR 1247 (A). eff. 7–31–89
1984–85 OMR 18 (A). eff. 8–1–84: 1983–84 OMR 1030 (A). eff. 5–3–84: 1982–83 OMR 1228 (A). eff. 5–31–83
1982–82 OMR 485 (A). eff. 1–25–82: 1980–81 OMR 334 (A). eff. 1–2–81: 1979–80 OMR 4–586 (A). eff. 3–1–80
1978–79 OMR 4–466 (A). eff. 2–28–79: 1977–78 OMR 3–14 (A). eff. 2–5–77 prior NRw3–03

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 96-579

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

FRANK REYNOLDS, d/b/a/ Reynolds Fisheries, et al.,
Petitioners

v.

FRANCES S. BUCHHOLZER,
Director of Ohio Department of Natural Resources, et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BETTY D. MONTGOMERY
OHIO ATTORNEY GENERAL

Jeffrey S. Sutton
State Solicitor
Joan C. Weiser
Assistant Attorney General
Ohio Dept. of Nat. Resources
Counsel of Record
Fountain Square, D-2
Columbus, Ohio 43224
(614) 265-6870

9 pp

QUESTION PRESENTED FOR REVIEW

Whether Ohio conservation laws that do not differentiate between in-state and out-of-state commercial fishing interests violate the Commerce Clause.

PARTIES TO THE PROCEEDINGS

Petitioners:

Frank Reynolds, d/b/a/ Reynolds Fisheries, Port Clinton Fish Company and James Maricque.

Respondents:

Frances S. Buchholzer, Director of the Ohio Department of Natural Resources, succeeded in office by Donald C. Anderson on January 10, 1995; Richard B. Pierce, Chief, Ohio Division of Wildlife, succeeded in office by Michael J. Budzik on December 10, 1995; and George V. Voinovich, Governor of Ohio.

TABLE OF CONTENTS

	Page No.
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REASONS FOR DENYING THE WRIT	1
CONCLUSION	3

TABLE OF AUTHORITIES

Page No.

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978) 2

Burns Harbor Fish Co. v. Ralston, 800 F. Supp. 722 (S.D. Ind. 1992) 3

Hughes v. Oklahoma, 441 U.S. 322 (1979) 2

New York State Trawlers Ass'n v. Jorling, 16 F. 3d 1303 (2nd Cir. 1994) 3

Oregon Waste Syst. Inc. v. Dept. of Envtl. Quality of State of Oregon, 511 U.S. 93 (1994) 1

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 2

Reynolds v. Buchholzer, 87 F. 3d 827 (6th Cir. 1996) 2

Solis v. Miles, 524 F. Supp.1069 (S.D. Tex. 1981) 3

Other Authorities:

U.S. Const. art. I, § 8, cl. 3 . . . . . *passim*
Ohio R.C. 1533.63 1
Ohio Admin. Code 1501:31-3-01 1

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS.

The Petition should be denied because the Sixth Circuit opinion is not in conflict with any lower court authority. Petitioners simply have not alleged, much less shown, that there is any disagreement among the lower courts on the issue presented in the Petition.

II. THE LOWER COURT CORRECTLY REJECTED PETITIONERS' COMMERCE CLAUSE CLAIM.

In any event, the Sixth Circuit correctly rejected Petitioners' argument on the merits. Petitioners cannot establish a case of facial discrimination to Ohio R.C. 1533.63 and Ohio Admin. Code 1501:31-3-01 because the Ohio laws are neutral on their face. They treat in-state and out-of-state interests exactly the same; they do not draw any geographic lines; and as a result do not facially discriminate against interstate commerce. *Oregon Waste Syst., Inc. v.*

Dept. of Envtl. Quality of State of Oregon, 511 U.S. 93 (1994).

Nor can Petitioners properly claim that the laws place an undue burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (where a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142). A State's interest in conservation of wildlife clearly is a legitimate objective for state regulation. *Hughes v. Oklahoma* (1979), 441 U.S. 322; *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). The Ohio laws further the important State objective of conservation of walleye and yellow perch in Ohio waters, and accordingly "[t]he local benefits of the [Ohio] law would appear to outweigh any burden on interstate commerce." *Reynolds v. Buchholzer*, 87 F.3d 827

(6th Cir. 1996); Petition, Appendix page A-6.

Other courts have reached the same conclusion in similar cases. *See New York State Trawlers Ass'n v. Jorling*, 16 F. 3d 1303 (2nd Cir. 1994) (upholding New York law that prohibits vessels equipped with trawler nets from taking lobster in Long Island Sound); *Burns Harbor Fish Co. v. Ralston*, 800 F.Supp. 722 (S.D. Ind. 1992) (upholding Indiana law that prohibits fishing with gill nets); *Solis v. Miles*, 524 F. Supp. 1069 (S.D. Tex. 1981) (upholding Texas law that prohibits commercial fishing of redfish and speckled sea trout in Texas waters).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO

Jeffrey S. Sutton
State Solicitor

Joan C. Weiser
Assistant Attorney General
Counsel of Record
Environmental Enforcement Section
Fountain Square, D-2
Columbus, OH 43224
(614) 265-6870